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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 706

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

ELLIS ARNALL, DIRECTOR OF PRICE STABILIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 55) is reported at 195 F. 2d 319.

JURISDICTION

The judgment of the Emergency Court of Appeals (R. 59) was entered on March 13, 1952. The petition for a writ of certiorari was filed on April 12, 1952. The jurisdiction of this Court is invoked under Section 408 (d) of the Defense Production Act of 1950 (Act of September 8, 1950, 64 Stat. 798, 808, 50 U. S. C. App. (Supp. IV) 2108).

QUESTIONS PRESENTED

1. Whether failure of the Office of Price Stabilization to complete a study of margins and earnings of food distributors announced in the Statement of Considerations of a ceiling price regulation constitutes "new grounds" within the meaning of Section 407 (a) of the Defense Production Act of 1950, which permits the filing of a protest within six months after the "effective date" of a regulation or within six months after "new grounds" for a protest arise.

2. Whether Congressional extension of the life of the Defense Production Act of 1950 constitutes such "new grounds."

STATUTE INVOLVED

Section 407 (a) of the Defense Production Act of 1950 (Act of September 8, 1950, 64 Stat. 798, 807, 50 U. S. C. App. (Supp. IV) 2107) provides as follows:

> At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in sup-

port of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President. Within a reasonable time after the filing of any protest under this section, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the President has taken official notice.

STATEMENT

This suit arises out of the dismissal by the Director of Price Stabilization of a protest, filed by petitioner on November 23, 1951, alleging that Ceiling Price Regulation No. 15 (CPR 15) is "unfair and inequitable as it is applied to Protestant and to others similarly situated" (R. 3). The protest was dismissed as not timely filed (R. 21–25) under Section 407 (a) of the Defense Production Act (64 Stat. 807, 50 U. S. C. App. (Supp. IV) 2107) which permits the filing of a protest "within six months after the effective date of any regulation or order * * * or, in

the case of new grounds arising after the effective date of any such regulation or order * * * within six months after such new grounds arise * * *."

The relevant facts are not in dispute and are as follows:

CPR 15 was issued March 28, 1951, effective April 5, 1951 (16 F. R. 2735). Its pricing provisions were made mandatory as of April 30, 1951, which date was later extended to May 14, 1951 (16 F. R. 3650). It provides in general for a percentage markup-on-cost method of establishing ceiling prices similar to that employed by the Office of Price Administration under the Emergency Price Control Act of 1942. To facilitate prompt issuance of the regulation, the Office of Price Stabilization used the markups established by OPA during the years 1943 to 1946, recognizing, however, that in some categories "markups have changed substantially since the war." The Statement of Considerations accompanying the regulation read in part as follows: "The Office of Price Stabilization is now organizing a study of margin and earning figures for food distributors in order to obtain more recent comprehensive data. If the study should indicate that the ceiling prices established under this regulation are either too low or too high, the regulation will be promptly revised to reflect the results of the survey."

Petitioner did not file its protest within six

months after the effective date of CPR 15,[1] but claimed that the failure of the Director of Price Stabilization to complete the survey "promised" in the Statement of Considerations within a reasonable time constituted new grounds within the meaning of Section 407 (a), thus extending the time within which a protest could be filed.

After the Office of Price Stabilization dismissed the protest on the ground that the failure to complete the survey did not constitute "new grounds" for challenging CPR 15 (R. 21), petitioner filed a complaint in the Emergency Court of Appeals based on the grounds urged in its protest (R. 39). In its brief in that court it claimed for the first time, as additional new grounds within the meaning of Section 407 (a), the extension of the life of the Defense Production Act to June 30, 1952 (by the Defense Production Act Amendments of 1951, Act of July 31, 1951, 50 U. S. C. A. App. 2166) (R. 57).

The Emergency Court of Appeals dismissed the complaint, holding that no new grounds for protest had been shown by petitioner and that the respondent had properly dismissed petitioner's protest against CPR 15.

[1] The regulation as issued prescribes April 5, 1951, as the "effective date" although the pricing provisions were not to become mandatory until April 30, 1951. The date for mandatory prices was subsequently extended to May 14, 1951. The protest was filed on November 23, 1951, more than six months after the latest of those dates.

ARGUMENT

The decision below correctly interpreted the requirement of Section 407 (a) of the Defense Production Act that a protest, to be timely, must be filed "within six months after the effective date of [the] regulation * * * or, in the case of new grounds arising after the effective date of [the] regulation * * * within six months after such new grounds arise * * *." Petitioner did not, of course, file its protest within six months after the "effective date" of CPR 15. And neither the failure of the Director to complete a survey of margins nor the extension of the Defense Production Act reopens the time for filing a protest within the meaning of the statute.

1. Failure to complete the survey announced in the Statement of Considerations accompanying CPR 15 cannot satisfy the requirement of Section 407 (a) that "new grounds" support the filing of a protest more than six months after the effective date of a price regulation. The statute plainly contemplates that a price order or regulation must be challenged within six months of its effective date, or not at all. The "new grounds" provision permits a later challenge only where subsequent changes in circumstances render the regulation no longer generally fair and equitable. And the right to file a protest by reason of "new grounds" is limited to those aspects of the regulation affected by the new grounds. This was the interpretation of the Emergency Price

Control Act of 1942 (*Harlem Metal Corp.* v. *Brown,* 136 F. 2d 242, 244 (E. C. A.); *Bibb Mfg. Co.* v. *Bowles,* 140 F. 2d 459, 461 (E. C. A.)), which presumably was incorporated in the Defense Production Act by adoption of a comparable provision in Section 407 (a).[2] See Senate Report No. 2250, 81st Cong., 2d Sess., p. 40. But petitioner does not contend that CPR 15 was initially fair and equitable and has become unfair because of the failure to modify it. Its protest is directed solely against the initial validity of CPR 15. Since no timely protest was filed, however, the validity of the regulation as originally issued must be assumed. In the absence of changed circumstances, CPR 15 is now immune from attack. To permit an allegation of continued unfairness to reopen a regulation to protest, without requiring a showing that new conditions alter its effect, would render meaningless the six months' limitation period.

The argument implicit in petitioner's asserted "new grounds," that it was entitled to wait a reasonable time because the Director postponed

[2] Section 203 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 31) prescribed a sixty-day period for the filing of protests and provided that "at any time after the expiration of such sixty days any persons * * * may file * * * a protest based solely on grounds arising after the expiration of such sixty days." Section 203 (a) was amended by the Act of June 30, 1944 (58 Stat. 632, 638) to remove the limitation provision; as amended, it permitted the filing of a protest "at any time."

a finding of fairness until the survey had been completed,[3] is refuted by the terms of the regulation itself. The Statement of Considerations discloses that the Director of Price Stabilization gave careful consideration to the claims of the chain stores and supermarkets that the OPA markups were inadequate and to the data presented in support of these claims (R. 28). In some food categories, where the data indicated that markups had changed substantially since the war, some adjustments were made in issuing the regulations (R. 28). It was pointed out, however, that a substantial increase in food prices which had occurred since the war, as well as "a marked and rapid increase in physical

[3] Petitioner has not been a sluggard suitor in challenging price control regulations in the past. See *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278 (E. C. A.), certiorari denied, 320 U. S. 797; *Safeway Stores, Inc.* v. *Bowles*, 145 F. 2d 836 (E. C. A.), certiorari denied, 324 U. S. 847; *Safeway Stores, Inc.* v. *Bowles*, 145 F. 2d 846 (E. C. A.); *Safeway Stores, Inc.* v. *Porter*, 154 F. 2d 656 (E. C. A.), certiorari denied, 328 U. S. 863; *Safeway Stores, Inc.* v. *DiSalle*, No. 583, Emergency Court of Appeals, decided January 18, 1952; *Safeway Stores, Inc.* v. *DiSalle*, No. 585, Emergency Court of Appeals, decided October 9, 1951, certiorari denied, 342 U. S. 903; *Safeway Stores, Inc.* v. *Arnall*, No. 590, now pending before the Emergency Court of Appeals; *Safeway Stores, Inc.* v. *Arnall*, No. 591, decided May 5, 1952; *Safeway Stores, Inc.* v. *Arnall*, No. 598, decided April 3, 1952; *Safeway Stores, Inc.* v. *Arnall*, No. 599, decided May 12, 1952.

It should be noted that No. 591 involved a protest filed in due time against CPR 15.

volume," permitted food distributors to realize adequate dollar margins despite the possibility of a slight reduction in percentage markups (R. 28–29). Accordingly, the Director of Price Stabilization found "that the markups set forth in these regulations will produce generally fair and equitable prices" (R. 30).[4]

In view of the finding that the markups were fair and equitable at the time of the issuance of the regulation and the failure of petitioner to protest within six months of its effective date or to allege circumstances arising after the effective date which rendered the regulation no longer generally fair and equitable, the court below properly dismissed the complaint as based upon a protest filed out of time.

2. Petitioner also argues that the Defense Production Act was originally scheduled to expire on June 30, 1951; that Congress extended it to June 30, 1952;[5] that Congress thereby "reim-

[4] The conclusion to the regulations contains the following paragraph (R. 37):

"In formulating these regulations the Director of Price Stabilization has consulted extensively with industry representatives and has given full consideration to their recommendations. In his judgment the provisions of these regulations are generally fair and equitable and are necessary to effectuate the purposes of Title IV of the Defense Production Act of 1950."

[5] Congress first extended the Act for one month until July 31, 1952, P. L. 69, 82d Cong., 1st Sess., approved June 30, 1951. Congress later extended it for an additional eleven months to June 30, 1952. The Defense Production Act Amendment of 1951, P. L. 96, approved July 31, 1951.

posed" CPR 15 on petitioner and that the "re-imposition" of controls created a "new impact" on petitioner which constituted "new grounds" under Section 407 (a). What petitioner is saying, in effect, is that it held off filing a protest because it was confident that price controls would lapse. Because this hope was unrealized, petitioner claims that it now operates under a burden which it did not foresee and that the extension is therefore "new grounds" for a protest. This contention was fully answered by the court below (R. 58):

> * * * the fact is that the Defense Production Act of 1950 did not expire either on June 30, 1951 or July 31, 1951. On the contrary prior to its expiration on each of those dates it was amended by substituting the later expiration date. The act must, therefore, be regarded as one continuous statute remaining in force unchanged, except as amended, until its ultimate expiration. In other words, by virtue of the amendments the act did not terminate either on June 30, 1951 or July 31, 1951, but has continued in force from the time of its original enactment until the present day. It follows, therefore, that CPR 15 likewise continued in force by virtue of its original promulgation and was not reissued on June 30, 1951 or July 31, 1951 either impliedly or otherwise. The amendments of the act which postponed its expiration date accordingly did not affect the limitation upon protests contained in Section 407

(a) or operate to toll that period with respect to the complainant's protest.

Under any other construction, not only would the Defense Production Act extension in 1951 have reopened to protest all the regulations issued under the original 1950 Act, but all of the regulations issued to date would again be reopened to protest if Congress should again extend the Act.

In any event, this allegation of new grounds was not made the basis of the protest filed with the Office of Price Stabilization (after the extension of the Act) and under the terms of the Defense Production Act it cannot be urged in the courts. Section 408 (a).

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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